Rodrigue v. Rodrigue: The Fifth Circuit Aligns with *Worth*—Accepting Copyright as Community Property

I. OVERVIEW 165
II. BACKGROUND 166
III. THE COURT'S DECISION 169
IV. ANALYSIS 172
V. CONCLUSION 173

I. OVERVIEW

George Rodrigue is a widely acclaimed painter who has painted numerous artworks depicting his signature image, the "Blue Dog," (modeled after the family pet, Tiffany) against a variety of backgrounds.[1] Mr. Rodrigue married Veronica Hidalgo in 1967 and lived under Louisiana's community property regime until their divorce in 1994.[2] Mr. Rodrigue created numerous paintings during and after his marriage.[3] After the divorce, Mr. Rodrigue invoked the state court's jurisdiction to partition the property of the marital community.[4] Mr. Rodrigue, along with his former business partner Richard Steiner, filed an action to declare, among other things, that the Blue Dog image is owned by Mr. Rodrigue and not owned by the marital community.[5]

Since there was no factual dispute, the district court granted Mr. Rodrigue's motion for summary judgment, holding that the Copyright Act preempted Louisiana's community property law with regard to ownership of copyrights, therefore vesting sole ownership in Mr. Rodrigue and excluding the copyrights to the Blue Dog image from the community.[6] The United States Court of Appeals for the Fifth Circuit disagreed and held that federal copyright law does not conflict with, and therefore does not preempt, Louisiana community property law to the extent of denying the entitlement of the nonauthor spouse to an undivided one-half interest in the economic benefits of the copyrighted works created by the author during the existence of the

1. *See* Rodrigue v. Rodrigue, 218 F.3d 432, 433 (5th Cir. 2000).
2. *See id.* at 432.
3. *See id.*
4. *See id.*
5. *See id.* at 434.
6. *See* Rodrigue v. Rodrigue, 55 F. Supp. 2d 534, 547 (Ed. La. 1999), *rev'd*, 218 F.3d 432 (5th Cir. 2000).

community, and of the derivatives of such works following its termination. *Rodrigue v. Rodrigue*, 218 F.3d 432, 435 (5th Cir. 2000), *cert. denied*, No. 00-1059, 2001 U.S. LEXIS 2007 (Mar. 5, 2001).

II. Background

The United States Constitution empowers Congress to enact copyright laws "[t]o promote the Progress of Science . . . by securing for limited Times to Authors . . . the exclusive Right to their . . . Writings."[7] Congress enacted the Copyright Act of 1976, which provides that, "[c]opyright in a work protected under this title vests initially in the author or authors of the work."[8] While copyright vests initially in the author, it may be transferred by any means of conveyance or by operation of law.[9]

An "author" is the person to whom the work "owes its origin," its "originator" or "maker," and to qualify as an "author," one must contribute significant copyrightable expression to a work.[10] The 1976 Act provides that "[c]opyright protection subsists . . . in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device."[11] At the time of creation, authors of copyrighted works are given a bundle of exclusive rights to reproduce, to adapt, to distribute, to perform publicly, and to display publicly the copyrighted works.[12]

There are two primary goals of U.S. copyright law, (1) to provide incentives for authors to create and (2) to ensure access to the works for the benefit of the public.[13] With these goals in mind, Congress,

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7. U.S. CONST. art. I, § 8, cl. 8.
8. 17 U.S.C.A. § 201(a) (West 2000).
9. *See id.* § 201(d)(1).
10. *See* Dane S. Ciolino, *Why Copyrights Are Not Community Property*, 60 LA. L. REV. 127, 133 (1999) (citing Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53, 58 (1884) (stating that an author is the party who actually creates the work)). Dane Ciolino is an Assistant Professor Of Law at the Loyola University of New Orleans. Professor Ciolino represented Richard Steiner (George Rodrigue's business partner) in this case. The actual brief he submitted petitioning for a rehearing en banc is available at http://www.loyno.edu/dciolino/Projects?Rodrigue_v_Rodrigue_En_Banc_Petition.pdf.
11. 17 U.S.C.A. § 102(a) (West 2000). Works of authorship encompass many categories including literary works, musical works, dramatic works, pictorial works, motion pictures, sound recordings, and architectural works. *See id.* § 102(a)(1-8).
12. *See id.* § 106 (1-6).
13. *See* Carla M. Roberts, Note, *Worthy of Rejection: Copyright as Community Property*, 100 YALE L.J. 1053, 1057 (1991) ("Authors are protected . . . because society has decided to encourage them to create things like books and music."); Stewart v. Abend, 495 U.S. 207, 209 (1990) (stating the Copyright Act "create[d] a balance between the artist's right to control the

through enacting a single national standard embodied in the Copyright Act, wanted all authors to have the same rights and protections, thus allowing copyrighted works to be exchanged efficiently.[14] The goals of copyright law conflict, in part, with the goals of community property law.

Community property laws exist in order to recognize in economic terms the contribution of the nonbreadwinner spouse and to place them on equal footing with the breadwinner spouse.[15] Community property is based on the theory that the marital community is a partnership between the spouses.[16] In the partnership, both spouses should share equally in the accumulated wealth because both have made possible the acquisition of wealth by one member.[17]

In Louisiana, community property is comprised of "property acquired during the existence of the legal regime through the effort, skill, or industry of either spouse."[18] However, not all property acquired during the existence of the community is community property.[19] The property that does fall within the scope of community property "belong[s] to both [spouses] by halves."[20] The conflicts between copyright law and community property law exist principally because copyrights are treated as property, and as such, they are subjected to community ownership, rather than vesting exclusively in the author.

The first and most notorious case to consider whether copyrights should be treated as community property was *In re Marriage of Worth*.[21] In *Worth*, the author-spouse (husband) wrote and published several books, including a few books on trivia.[22] The husband filed an

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work during the term of the copyright protection and the public's need for access to creative works").

14. *See* Roberts, *supra* note 13, at 1059.

15. *See id.*; Ciolino, *supra* note 10, at 131 (explaining that spousal equality is the policy rationale behind Louisiana's community property system).

16. *See* Peter J. Wong, *Asserting the Spouse's Community Property Rights in Copyright*, 31 IDAHO L. REV. 1087, 1095 (1995).

17. *See id.*

18. LA. CIV. CODE art. 2338 (1985); *see also* CAL. FAM. CODE §§ 760, 770, 781 (Deering 1994) ("Community property is all real property situated in the state and all personal property wherever situated, which is acquired during marriage by a person domiciled in California, which is not separate property . . . .").

19. *See* Ciolino, *supra* note 10, at 132 (providing that property acquired through means other than spousal labor during the marriage is often classified as separate property and does not become part of the community, such as things acquired prior to the establishment of the legal regime or through individual inheritance or donation).

20. *See id.* (citing WILLIAM Q. DE FUNIAK & MICHAEL J. VAUGHN, PRINCIPLES OF COMMUNITY PROPERTY § 66, at 140 (2d ed. 1971)).

21. 241 Cal. Rptr. 135, 136 (1987).

22. *See id.* at 135.

action against producers of the board game, "Trivial Pursuit," alleging copyright infringement.[23] Thereafter, his wife sought an order declaring that she would be entitled to one-half of any proceeds derived from that lawsuit. The trial court granted her request, and the husband appealed.[24]

On appeal, the husband made several persuasive arguments. First, he argued that a copyright in a protected work "vests initially in the author or authors of the work"; thus the copyright belongs only to the author.[25] The court rejected this argument because in California, "all property acquired during marriage is community property"; thus there seems little doubt that any artistic work created during the marriage constitutes community property.[26]

Second, the husband argued that the federal Copyright Act preempts California's community property laws, because community property laws provide for equal interest to both spouses in community assets, whereas the Copyright Act vests ownership of the copyright in the author alone, creating an irreconcilable conflict compelling preemption of state law.[27] The court rejected this argument relying on *Hisquierdo*. In *Hisquierdo*, the United States Supreme Court held that state law was preempted by the federal Railroad Retirement Act because of express language in the Act defining the retirement benefits to be the separate property of the designated recipient.[28] The court reasoned that the Copyright Act did not expressly designate copyrights as separate property, thus making *Hisquierdo* inapplicable.[29]

In *Worth*, the court held that there was no inconsistency between the federal Copyright Act and California's community property law so as to invoke the preemption doctrine; thus, the copyrights on the trivia books were found to be divisible community assets.[30] This decision prompted a frenzy of heated academic debate, with most scholars

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23. *See id.*
24. *See id.*
25. *See id.* at 138.
26. *See id.*
27. *See id.* at 139.
28. *See id.*; Hisquierdo v. Hisquierdo, 439 U.S. 572, 582 (1979) ("California must defer to the federal statutory scheme for allocating Railroad Retirement Act benefits insofar as the terms of federal law require."). The *Hisquierdo* court also noted that holding otherwise would frustrate the congressional objective, and it may even provide an employee with an incentive to keep working, rather than retiring, because the former spouse has no community property claim to salary earned after the marital community is dissolved. *See id.* at 585; *see also* 17 U.S.C.A. § 301 (West 2000) (allowing for preemption with respect to other laws).
29. *See Worth*, 241 Cal. Rptr. at 139-40.
30. *See id.*

criticizing *Worth* as a decision without merit.[31] One scholar noted that the decision in *Worth* was incongruous with the intent of federal copyright laws to provide the author with an incentive to create.[32]

More recently, the Fifth Circuit considered whether the Copyright Act preempts the Texas tort of misappropriation in the case of *Brown v. Ames*.[33] In concluding that preemption did not apply, the court analyzed the preemption requirements in § 301 of the Copyright Act.[34] However, the court noted that although § 301 preemption is not appropriate, conflict preemption might be, because in the United States Constitution, the Supremacy Clause dictates that a state law that obstructs the accomplishment of the full purposes and objectives of the United States Congress is preempted.[35] The court supported its decision with Supreme Court precedent suggesting that courts should take a middle ground in considering copyright preemption cases, especially where Congress has indicated its awareness of the operation of state law in a field of federal interest.[36]

III. THE COURT'S DECISION

In the noted case, the Fifth Circuit seems to find comfort in the middle ground again, holding that the Copyright Act does not preempt Louisiana's community property laws.[37] The court held that an author-spouse in whom a copyright vests maintains exclusive managerial control of the copyright, but that the economic benefits of the copyrighted work belong to the community while it exists and to the former spouses in indivision thereafter.[38] The Fifth Circuit finds

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31. *See* Roberts, *supra* note 13, at 1053; David Nimmer, *Copyright Ownership by the Marital Community: Evaluating Worth*, 36 U.C.L.A. L. REV. 383, 385 (1988); Debora Polacheck, *The Un-Worth-Y Decision: The Characterization of a Copyright as Community Property*, 17 HASTINGS COMM./ENT. L.J. 601, 603 (1995); Michael Perlstein, *Copyright as Community Property: Questions About Worth Are More Than Merely Trivial*, 9 ENT. L. REP. 3 (Apr. 1988); Lydia A. Nayo, *Revisiting* Worth*: The Copyright as Community Property Problem*, 30 U.S.F. L. REV. 153 (1995). *But see* Peter J. Wong, *Asserting the Spouse's Community Property Rights in Copyright*, 31 IDAHO L. REV. 1087, 1038 (1995).

32. *See* Roberts, *supra* note 13, at 1072.

33. 201 F.3d 654, 657 (5th Cir. 2000).

34. *See id.* (citing Daboub v. Gibbons, 42 F.3d 285, 289 (5th Cir. 1995)) ("Section 301 requires the fulfillment of two conditions: (1) the content of the protected right must fall in the subject matter of the copyright, and (2) the nature of the rights granted under state law must be equivalent to any of the exclusive rights in the general scope of a federal copyright."); 17 U.S.C.A. § 301(a) (West 2000).

35. *See Brown*, 201 F.3d at 659 (citing Hines v. Davidowitz, 312 U.S. 52, 67 (1941)).

36. *See id.* at 661 (citing Bonito Boats, Inc. v. Thunder Craft Boats, Inc., 489 U.S. 141, 166-67 (1989) ("[T]he case for federal preemption is particularly weak where Congress has indicated its awareness of the operation of state law . . . .").

37. *See* Rodrigue v. Rodrigue, 218 F.3d 432, 439 (5th Cir. 2000).

38. *See id.* at 435.

that this resolution is consistent and reconcilable under both the federal copyright law and the Louisiana community property law, therefore precluding the application of the preemption doctrine.[39]

The court recognized that it had the task of sorting out and reconciling the respective rights and obligations of authors under the federal copyright law and their spouses under Louisiana community property law.[40] The court began its analysis by rejecting Mr. Rodrigue's contention that provisions of both the Copyright Act and the U. S. Constitution preempt state community property law.[41] The court called the clash between the two legal regimes a "facial contrast," disagreeing with Mr. Rodrigue's expansive view of the scope of the conflict, and thus with the preemptive effect of such conflict.[42]

The court delineated the precise language of § 201(a), which Mr. Rodrigue based his preemption theory on, by focusing on the bundle of rights pertaining to copyright in § 106, and noting that none of the rights either expressly or implicitly include the exclusive right to enjoy income or any of the other economic benefits produced or derived from copyrights.[43] The court looked more closely at § 201, and noted that it speaks of ownership in light of the five exclusive rights, not ownership per se.[44] In so concluding, the court reasoned that § 201 supports the more limited construction that "vesting" of the copyright and its five statutorily delineated attributes in one spouse does not preclude classification of the copyright as community property.[45]

The court discussed the relevance of the "initial vesting" language in § 201(a) by contrasting it with the absence of language indicating permanent vesting of the copyright in the author.[46] The court concluded that the language in § 201(a) would support the proposition that the nonauthor spouse (Ms. Rodrigue) does have an economic interest in Mr. Rodrigue's copyrights.[47]

The court explained that in Louisiana under the Civil Law, the bundle of rights that together constitutes full ownership of property comprises three separate sub-bundles: (1) usus—the right to utilize

39. *See id.*
40. *See id.* at 433.
41. *See id.* at 435.
42. *See id.*
43. *See id.*; *see also supra* text accompanying note 12.
44. *See Rodrigue*, 218 F.3d at 435-36; 17 U.S.C.A. § 201(a) (West 2000).
45. *See Rodrigue*, 218 F.3d at 436.
46. *See id.*
47. *See id.*

the property; (2) abusus—the right to transfer, lease, and encumber the property; and (3) fructus—the right to enjoy the earnings produced or derived from the property.[48] The three sub-bundles of ownership can be allocated in various amounts among different persons, each having less than full ownership.[49]

In regard to ownership of a copyright, the court reasons that the author-spouse has the exclusive right to possess, use, transfer, alienate, and encumber the copyright as needed (similar to usus and abusus), free of any consent or participation of the nonauthor spouse.[50] The community during its existence has the right to receive and enjoy the economic benefits (or fructus) from the copyright.[51] After the property characterization of copyright has been made, the court turns to the effect of this scheme on marital property.[52]

The Louisiana Code provides for "equal management" of property belonging to the community, giving each spouse, acting alone, the right to manage, control, or dispose of community property.[53] The court recognizes that the "equal management" approach conflicts facially with the author-spouse's bundle of five exclusive rights. However, there is an exception in the Louisiana Civil Code relating to "equal management," which provides that such spouse alone has exclusive management rights, but preserves for the spouses jointly, the right to enjoy the benefits of such property.[54] The court gives an example of a paycheck issued in the name of the employee-spouse. While the paycheck is only negotiable by that spouse, once it is negotiated, the proceeds belong to the community.[55]

In concluding that copyrights should be treated in the same manner as paychecks, the court discusses the classification of copyright in Louisiana.[56] In Louisiana, a copyright is a "movable," and as such it is issued or registered under the name of the author-spouse, allowing for the author-spouse to have exclusive management

48. *See id.* at 436-37; LA. CIV. CODE 477 (1980) (providing an owner of a thing may use, enjoy, and dispose of it).

49. *See Rodrigue*, 218 F.3d at 437.

50. *See id.* However, the court does flag Civil Code article 2369.3, which imposes an affirmative duty on a spouse "to preserve and manage prudently former community property under his control" and makes him "answerable for damages in the event of fault, default, or neglect." *See id.* n.22.

51. *See id.* The court analogizes the division of ownership in copyright with that found in a usufruct. *See id.*

52. *See id.* at 437-38.

53. *See id.* at 438.

54. *See id.*; LA. CIV. CODE art. 2346 (1985; *id.* art. 2351 (1985).

55. *See Rodrigue*, 218 F.3d at 438.

56. *See id.*

powers, while also ensuring that the nonauthor-spouse is not deprived of his or her right to one-half of the economic benefits.[57]

The court addresses Mr. Rodrigue's next contention that if § 301 preemption does not apply, "conflict preemption" does apply, because designating copyrights as community property would do substantial damage to important federal interests, namely preventing the efficient exchange of copyrights.[58] The court disagrees pointing to its previous discussion of the Civil Code's exception allowing a spouse to exclusively manage the property.[59]

Mr. Rodrigue's next argument is that predictability and uniformity will not be served if varying state laws are to be applied to copyright management issues.[60] The court rejected his argument by noting that copyrights are transferable by conveyance, and thus, can produce co-ownership of undivided interests. Therefore, the court found no reason to treat community property in a different manner.[61]

Mr. Rodrigue's final contention is that authors will have less incentive to create if they must share the fruits of their creative works with the marital community.[62] The court explains that the author would be unwise to shelve his or her copyrights after the divorce and receive no benefit whatsoever, and it also points out that Louisiana imposes a duty to prudently manage the former community property.[63] The court then remanded the case back to the district court in order to determine which copyrights are subject to the rules announced in the decision.[64]

IV. ANALYSIS

The Fifth Circuit reached an incorrect result by not preempting conflicting state community property law with controlling federal copyright law. The court was able to reconcile the conflict of copyright ownership, by vesting in the author exclusive managerial control, and vesting in the community the economic benefits flowing from the copyrighted work. The court's reasoning conflicts with the intent embodied in the Copyright Clause of the United States Constitution. The Copyright Clause gives authors the exclusive right

57. *See id.* at 439.
58. *See id.* at 440.
59. *See id.* at 441.
60. *See id.* at 440.
61. *See id.* at 441.
62. *See id.*
63. *See id.* at 442; *supra* note 50 and accompanying text.
64. *See id.*

to their creations, which implicitly includes the right to receive economic benefits without having to account for them to the community.

The court, in its own words, treats copyrights like paychecks. If that were applied more literally, then economic benefits flowing from copyrighted works would not end up in the hands of the former spouse upon termination of the community, because paychecks do not. The court concludes to the contrary, in finding that even after the termination of the community, the nonauthor-spouse is entitled to economic benefits derived from copyrighted works.

The court did not adequately address Mr. Rodrigue's third contention relating to the disincentive to further exploit his copyright based on having to share the economic benefits with his ex-wife. This point was conceded by the United States Supreme Court in *Hisquierdo*,[65] where the court noted that if the employee-spouse had to share federal retirement benefits with the community after its termination, he or she might just continue working rather than retiring, trampling the very intention of the Railroad Retirement Act.

V. CONCLUSION

The court is clearly asserting a biased policy towards community property while overlooking the primary objectives of the Copyright Act. The legislature should work to resolve this conflict in a way that properly balances the policy objectives of both copyright and state community property law. The objectives imbued in the Copyright Act can be furthered without frustrating the promotion of spousal equality through community property law. This note suggests that upon termination of the marital community, the nonauthor-spouse's right to receive economic benefits flowing from the copyright work cease—like rights in a paycheck.

Ishaq Kundawala

65. *See supra* note 28 and accompanying text.